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SUPREME COURT, U.S.

IN THE  
SUPREME COURT OF THE  
UNITED STATES

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TERM, 1978

No. 77-7012

CLIFFORD R. COMBS.

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

\_\_\_\_\_  
ON PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

\_\_\_\_\_  
BRIEF FOR RESPONDENT IN OPPOSITION  
\_\_\_\_\_

JOHN ASHCROFT  
Attorney General

PAUL ROBERT OTTO  
Assistant Attorney General

Supreme Court Building  
Post Office Box 899  
Jefferson City, Missouri 65102  
(314) 751-3321

Attorneys For Respondent

DANIEL F. LYMAN  
Assistant Attorney General  
of Counsel

TABLE OF CASES

State v. Combs, 564 S.W.2d 328 (Mo.Ct.App. at K.C. 1978);  
State v. Duren, 556 S.W.2d 11 (Mo. banc 1977);  
Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d  
690 (1975);

Article I, §22(b), Missouri Constitution

Article XII, §41, Louisiana Constitution (since repealed)

Section 494.010, RSMo. 1969

Section 494.020, RSMo. 1969, as amended

Section 494.031, RSMo. 1969, as amended

Section 497.130, RSMo. 1969, as amended

Chapter 497, RSMo. 1969, as amended

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OPINION BELOW

The opinion and decision of the Missouri Court of Appeals is reported at 564 S.W.2d 328 (Mo.Ct.App. at K.C. 1978). A copy of the opinion appears as petitioner's Appendix A.

JURISDICTION

On February 27, 1978, the Missouri Court of Appeals issued its opinion affirming the petitioner's conviction for one count of burglary second degree, and one count of stealing. Thereafter, on March 14, 1978, the petitioner filed a timely motion for rehearing. On April 3, 1978, the petitioner's motion for rehearing was overruled. Thereafter, an application to transfer the cause to the Missouri Supreme Court was filed on April 18, 1978, which application was denied on May 9, 1978. On June 30, 1978, the petitioner filed with this Court a petition for Writ of Certiorari to the Missouri Supreme Court. On August 15, 1978, the respondent was

directed to file a response in the instant case.

The jurisdiction of the Court is invoked under Title 28, United States Code, §1257(3).

#### QUESTION PRESENTED

WHETHER THE PETITIONER WAS DENIED THE RIGHT TO A FAIR TRIAL BY VIRTUE OF THE PROVISION OF THE MISSOURI CONSTITUTION WHICH PERMITS WOMEN TO DECLINE JURY SERVICE?

#### STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §22(b), of the Missouri Constitution, §494.020, §494.031, and Chapter 497 of the Missouri Revised Statutes, 1969 as amended. The Missouri constitutional and statutory provisions mentioned above are set out in full in the respondent's Appendix A.

#### STATEMENT

In December of 1976 the petitioner, Clifford R. Combs, was tried for, and convicted of, one count of burglary second degree and one count of stealing. Prior to trial, the petitioner filed a motion to quash the jury panel "that may be produced as prospective jurors", claiming that Article I, §22(b) of the Missouri Constitution operates to deny the petitioner a jury panel selected from a fair cross-section of the community. In support of his motion, the petitioner introduced Defendant's Exhibit 1 (a copy of which appears in petitioner's Appendix B). Defendant's Exhibit 1 is a stipulation entered into by the petitioner and the State of Missouri.

Briefly, the stipulation outlines the process by which jury wheels in Jackson County, Missouri are created, and prospective jurors are summoned. In paragraph 3, the stipulation presents a statistical analysis of the questionnaires returned by women in the process of assembling the 1976 jury wheel for Jackson County, Missouri.

By way of the stipulation, the petitioner sought to introduce evidence that women comprise 54.4% of the population of Jackson County, twenty-one years of age and older, that the petitioner's jury venire of twenty-four contained six women, and that approximately 29.1% of the 1976 Jackson County jury wheel was comprised of females. Additionally, the petitioner introduced evidence that women accounted for the following percentages of those who were summoned and appeared for jury service in the seven months preceding the petitioner's trial; January of 1976 - 12.3%; February of 1976 - 17.6%; March of 1976 - 17.0%; April of 1976 - 16.0%; May of 1976 - 13.0%; June of 1976 - 13.6%; and July of 1976 - 14.0%. Finally, the petitioner introduced evidence of a statistical analysis of those questionnaires which were mailed to voters for the purpose of assembling a 1976 jury wheel for Jackson County. The results of that analysis concluded that, of 30,165 questionnaires mailed to women, "[q]uestionnaires indicating that women declined to serve for no other apparent reason than the female exemption" were returned by 21,884 women.

Upon consideration of the petitioner's motion to quash the prospective jury panel, and the stipulation introduced in support thereof, the trial court denied the petitioner's motion.

Following the petitioner's trial and conviction, an appeal was taken to the Missouri Court of Appeals. In essence, the basis of the petitioner's argument on appeal was identical to that now advanced by the petitioner; that the exemption permitted by Article I, §22(b) of the Missouri Constitution operated to deny the petitioner the right to trial by a jury representing a fair cross-section of the community.

On February 27, 1978 the Missouri Court of Appeals affirmed the petitioner's conviction in an opinion contained in 564 S.W.2d 328. The court briefly disposed of the petitioner's constitutional arguments, citing the Missouri Supreme Court decision in State v. Duren, 556 S.W.2d 11 (Mo. banc 1977), a case in which this Court will hear argument during the October Term on a Writ of Certiorari to the Missouri Supreme Court. The petitioner's motion for rehearing was denied by the Court of Appeals on April 3, 1978, while his motion to transfer was denied by the Missouri Supreme Court on May 9, 1978.

In order to fully understand the question presented by this case, it is necessary to consider the jury selection system which is employed in Jackson County, Missouri. That system is mandated by §494.031, §494.020, and Chapter 497 of the Revised Statutes of Missouri, 1969 as amended and Article I, §22(b) of the Missouri Constitution. Each of these provisions appears in respondent's Appendix A.

The jury selection system in Jackson County begins with that county's voter registration list. From that list, the jury commissioner selects, at random and by computer, approximately 65,000 names. A questionnaire is then sent to each individual selected. A copy of that questionnaire appears in §497.130, RSMo., 1969 as amended, respondent's Appendix A. Among other things, the questionnaire notifies women of their right to be excused from jury duty. When the questionnaires are returned, the jury commissioner eliminates the names of all individuals whose questionnaire indicates that he has exercised his right to be excused, or that he is unqualified to serve as a juror. \*

\* In order to promote an orderly and efficient judicial system, certain individuals are excluded from jury service by §494.020, RSMo. 1969 as amended. For example, licensed attorneys and those unable to understand the English language may not serve on juries in Missouri. Section 494.031, RSMo., 1969 as amended, on the other hand, allows certain individuals to be excused from jury duty if they take a timely application to the court. For example, persons over 65 years of age, doctors of medicine, school teachers, government workers, and clergy may apply to be excused. Also, Article I, §22(b) of the Missouri Constitution mandates that the court shall excuse any woman who requests exemption before she is sworn.

The remaining pool of names is then entered into a computer, and nearly 28,000 names are randomly selected for the master jury wheel. If an individual fails to return the questionnaire, that individual's name is automatically included in the pool from which the master jury wheel is selected. In Jackson County, a new jury wheel is prepared each year.

Individuals are periodically selected from the master jury wheel by computer to make up the general jury panel for all civil and criminal divisions of the Jackson County Circuit Court. By random selection from the jury wheel, individuals are summoned to jury service. The summonses include a notification to women that they have a right to be excused from jury duty. After receiving a summons, an individual is given the opportunity to present to the circuit court reasons why he or she would be unable to serve as a juror. All jurors who are not excused should appear in the circuit court for jury duty. If a woman does not appear, it is assumed that she has exercised her right not to serve. Venire panels are then randomly selected from the individuals who have appeared for jury duty, and a petit jury is selected from the venire panel. In the petitioner's case, the record indicates that his jury venire of twenty-four contained six women, while his petit jury of twelve included one woman.

#### ARGUMENT

The decision of the Missouri Court of Appeals in State of Missouri v. Clifford R. Combs is not in conflict with this Court's decision in Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), in that Article I, §22(b) of the Missouri Constitution does not operate to exclude women from jury service.

In Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) (hereinafter, "Taylor"), this Court held that the jury selection system employed by the State of Louisiana deprived criminal defendants of their right to an impartial trial.



Louisiana Constitutional Article XII, §41 (since repealed) sets out the constitutionally offensive procedure:

"The legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no women shall be drawn for jury service unless she shall have previously filed with the clerk of the district court a written declaration of her desire to be subject to such service. . . ."

This Court concluded that the above-quoted provision operated to systematically exclude women from jury service, and therefore, deprived criminal defendants of a jury composed of a fair cross-section of the community.

Relying on the decision in Taylor, the petitioner argues that he too has been deprived of his rights to a fair trial because Article I, §22(b) of the Missouri Constitution allows women to avoid jury duty by requesting an exemption. The Louisiana constitutional provision cited, and Article I, §22(b) of the Missouri Constitution, however, are readily distinguishable. Under the constitutionally offensive Louisiana system, a woman would not have been eligible for jury service unless she were to have taken affirmative steps to inform the court of her desire to serve as a juror. In Missouri, however, women are automatically included in the jury list. They are excused from jury service only when they take affirmative steps to notify the courts that they do not wish to serve. The Missouri system of jury selection, therefore, does not exclude women. It merely permits women to actively seek exemption from jury service. This Court's opinion in Taylor stated ". . . jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." (Emphasis added)

Taylor, supra, at 538. While the petitioner relies on the above-quoted language from Taylor, it is evident that Missouri does not use the force of its law to exclude women from juries. On the contrary, Missouri merely permits women, through Article I, §22(b) of the Missouri Constitution, to exempt themselves from juries. Simply stated, Missouri excludes no women from jury service on the basis of their gender. The distinction between Louisiana's "opt-on" system and Missouri's "opt-off" system is crucial and dispositive.

Taylor also indicates that a defendant must show that the jury wheels from which juries are chosen fail to represent a cross-section of the community. The petitioner has asserted that he has met the burden of proof imposed by Taylor. The jury statistics in Taylor, however, outline a factual framework which is radically different from that with which we deal in this cause. In Taylor, 53% of the persons eligible for jury service were female, while no more than 10% of the persons on the jury wheel involved were women. In marked contrast, while in Jackson County the petitioner suggests that 54.4% of the persons eligible for jury service are women, the 1976 jury wheel list was comprised of slightly less than 29.1% females. Additionally, in Taylor there were no females in the 175 person jury venire. In the present case, there were 6 women on the petitioner's jury panel of 24, and one woman on his petit jury. It thus seems clear that this Court in Taylor was confronted by a Louisiana jury selection system which departed significantly from that which Missouri employs, and was confronted with lopsided statistics which bear no relationship to those produced by the petitioner in this case.

## II.

This case is plagued with evidentiary problems which will prevent this Court from reaching the question of whether the defendant's right to a fair trial has been denied.

The petitioner alleges that the exemption from jury service permitted females in Missouri causes gross under-representation of women on jury panels. The record in this case, however, fails to demonstrate, in a convincing fashion, any relationship between Article I, §22(b), and the alleged under-representation of women on juries in Jackson County.

First, the petitioner has failed to present eligible population statistics for the year of his trial. The stipulation introduced by the petitioner in support of his motion to quash included 1970 United States Census figures which show that Jackson County had approximately 407,000 inhabitants twenty-one years of age or older. Approximately 54% of those inhabitants were women. The annual Jackson County jury selection process, however, begins with a current voter registration list. No proof has been made that the sexes register to vote in direct relation to their numbers, or that there was not a significant change in the population makeup of Jackson County, Missouri, between 1970 and 1976 when the petitioner's jury was selected. As stated by the Missouri Supreme Court in State v. Duren, 556 S.W.2d 11 (Mo. banc 1977):

"All of this suggests that statistics of current 'eligible population' referred to in Alexander v. Louisiana, supra, not six year old gross population figures, provide the proper starting point." State v. Duren, supra, at 16.

Finally, certain other statistics presented by the petitioner in support of his argument are unpersuasive.

Specifically, the stipulation which the petitioner incorporates in his Appendix B refers, in paragraph 3, to certain data compiled on the questionnaires sent to potential jury members from Jackson County during 1976. The petitioner contends that these statistics demonstrate that 72.6% of the 30,165 women receiving the questionnaire opted-off jury service merely because, as females, they were permitted to do so by Missouri law. This conclusion remains unsupported.

The questionnaire which is the subject of the petitioner's stipulation was sent to prospective jurors in Jackson County, and filled out and returned by them in accordance with §497.130, RSMo., 1969 as amended. The petitioner's statistics indicate that 21,884 questionnaires (72.6% of those mailed to females) were returned "indicating that the women declined to serve for no other apparent reason than the female exemption." (Emphasis added, petitioner's Appendix B, stipulation, paragraph 3).

The last paragraph of the questionnaire reads:

"TO WOMEN:

"The constitution permits women to elect to serve or not to serve as jury women. Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.

I elect not to perform jury service.

.....  
Signature"

The sentence, "[i]t will not be necessary to answer the other questions" suggests that unascertainable numbers of the 21,884 women who returned questionnaires having signed

at the bottom of the paragraph quoted above did simply that; signed at the bottom of the paragraph and declined to fill out the rest of the questionnaire. The petitioner attempts to suggest that all questionnaires so returned were the questionnaires of women who were only subject to exemption from jury service by virtue of their gender. This suggestion is unsubstantiated. There is no proof offered that every woman who chose to simply sign her name was without the requisite qualifications for any number of other possible exemptions. If, for example, a woman was also a lawyer or a physician, the exemption she would have had for her profession would not have been noted on the questionnaire if she had merely expedited matters by signing the last paragraph. As a result, an indeterminate number of women who merely signed and returned the questionnaire might have had a basis for exemption for all those reasons listed in questions 3, 4, 5, 6, 8, 9, 11, and 12 of the questionnaire.

From the evidence produced by the petitioner, it has not been proved that all of those women returning a questionnaire who signed only the last paragraph were incapable of having themselves excluded on grounds other than gender and Article I, §22(b) of the Missouri Constitution. As a result, the petitioner has failed to prove that his jury was illegally constituted by virtue of Missouri's female exemption provisions.

Even if every questionnaire returned by a female was completely filled out, and if every one revealed no other possible basis for an exemption other than gender, that fact alone would still not demonstrate that those women would not have been exempted from jury service for other reasons recognized by Missouri, and unchallenged by the petitioner.

For instance, under §494.031, RSMo., 1969 as amended, a woman might have had an exemption for being an officer or

employee of the Executive, Legislative or Judicial branches of a federal, state, or county government. Likewise, if her jury service would be adverse to the public interest, or if it would impose an undue hardship on her, she would have received an exemption. Under §494.020, RSMo., 1969 as amended, a woman whose questionnaire when completely filled out revealed no apparent basis for an exemption, other than her gender, would nonetheless have been excluded had she been convicted of a felony, been unable to read, speak or write English, or not been correctly drawn. Similarly, §494.010, RSMo., 1969 as amended, demands that jurors be over twenty-one years of age, sober, intelligent citizens of the state, and residents of the city or county served by the jury.

All of the exemptions mentioned above might have been applicable to a woman whose questionnaire indicated only that she was a female and that none of the other exemptions specifically listed on the face of the questionnaire was applicable.

In conclusion, the petitioner's bare recital of the number of women who returned questionnaires having signed only the female exemption paragraph is not convincing. An unascertained number of those questionnaires could have come from women who could, on the face of the questionnaire, have received exemptions on another basis, or who, after having filled out the entire questionnaire, might nonetheless have received exemptions under §494.031, §494.020 or §494.010, RSMo., 1969 as amended.

It should be noted that in Taylor the parties stipulated that "the discrepancy between females eligible for jury service and those actually included in the venire was the

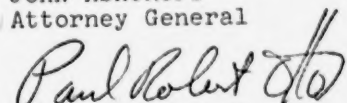
result of the operation of the Louisiana constitution".  
Taylor, supra, at 524. The parties in the present action  
have entered to no such stipulation. As a result, the  
petitioner has failed to demonstrate that Article I, §22(b)  
of the Missouri Constitution operates to deny him his rights  
under the Sixth and Fourteenth Amendments to the United  
States Constitution.

CONCLUSION

WHEREFORE, the respondent respectfully requests that  
this Court deny the petitioner's request for a writ of  
certiorari to the Missouri Supreme Court.

Respectfully submitted,

JOHN ASHCROFT  
Attorney General

  
PAUL ROBERT OTTO  
Assistant Attorney General

Supreme Court Building  
Jefferson City, Missouri 65101  
(314) 751-3321

Attorneys For Respondent

DANIEL F. LYMAN  
Assistant Attorney General  
of Counsel.